Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies To Provide Spectrum-Based Services	)	WT Docket No. 02-381
	)	
2000 Biennial Regulatory Review Spectrum Aggregation Limits For Commercial Mobile Radio Services	)	WT Docket No. 01-14
	)	
Increasing Flexibility to Promote Access to and the Efficient and Intensive Use of Spectrum and the Widespread Deployment of Wireless Services, and to Facilitate Capital Formation	)	WT Docket No. 03-202

To: The Commission

COMMENTS OF DOBSON COMMUNICATIONS CORPORATION

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SUMMARY

The Commission's current market driven licensing policies have successfully promoted the development of wireless services throughout rural America as well as a panoply of new technologies that are available and continue to become available to rural and urban consumers alike. However, the Commission has under consideration several proposals whose adoption would hinder, rather than facilitate, additional rural telecommunications development. Specifically, the Commission proposes to take back spectrum from existing licensees, impose more rigorous post-renewal substantial service requirements, and create easements or underlays on existing and future licensed spectrum. Dobson submits that, instead of spurring development, adoption of these proposals would create greater levels of uncertainty for mobile providers and the capital markets upon which they rely.

In fact, implementation of these proposals would detract from current (partitioning and disaggregation) and nascent (spectrum leasing) policies and have a negative effect on the industry and the stability of the market. The partitioning and disaggregation process remains an effective alternative for carriers, rural carriers in particular, to obtain spectrum or geographic areas that other carriers would not otherwise use, while the new "secondary markets" regulations provide still another means of increasing access to spectrum.

Of particular importance, Dobson strongly opposes the Commission's "keep what you use" approach for existing PCS and future CMRS licenses, a reversion to the inefficient and confusing cellular model, and Commission judgments on a market-by-market basis to determine whether spectrum is underutilized. A "keep what you use" approach would throw the market into flux and have the negative effect of encouraging carriers to inefficiently devote resources to unpopulated or sparsely populated areas solely to preserve future expansion opportunities, without any assurance that a re-taking of the spectrum would even result in efficient or economic development. "Keep what you use" also undercuts the secondary market initiative by coercing spectrum leasing at fire sale prices, thereby creating uncertainty in the capital markets that necessarily impacts a carrier's ability over the long-term to bring enhanced services to the areas where the potential return is smallest, *i.e.*, to rural consumers.

In lieu of the draconian "keep what you use" policy, Dobson espouses implementation of other incentive-based alternatives including the award of bidding credits, discounts on regulatory fees or other financial incentives to licensees who partition or lease spectrum in rural areas. Such government incentives serve the Commission's ultimate goal of making development in rural areas more financially attractive to the licensee while allowing a licensee to part with spectrum through a lease or partition if it were economically logical to do so. Finally, universal service type subsidies would be effective in helping licensees overcome a market dynamic that provides no incentives for carriers to serve areas that are cost prohibitive.

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Formation		

To: The Commission

COMMENTS
OF
DOBSON COMMUNICATIONS CORPORATION

Dobson Communications Corporation ("Dobson") hereby submits its comments in response to the Commission's September 27, 2004, *Further Notice of Proposed Rulemaking*[1] in the above-captioned proceeding. As a leading provider of commercial wireless services to rural communities throughout the United States, Dobson is particularly well-positioned to comment on

[1] *Facilitating the Provision of Spectrum Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, WT Docket No. 02-381, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 04-166 (rel. Sept. 27, 2004) ("*Rural R&O and Rural FNPRM*").

the remaining issues in this proceeding.[2] As demonstrated by Dobson's success in bringing advanced digital wireless services to virtually every area within its licensed markets, the Commission's market-oriented licensing policies have successfully promoted the development of wireless services throughout rural America. Dobson's success illustrates why regulatory coercion to facilitate spectrum access is unwarranted; rather than promote further development of rural telecommunications, such heavy-handed approaches are more likely to hinder rural development. For the reasons discussed in detail below, Dobson urges the Commission not to take any further action on its proposals, or if action is taken, to create positive economic incentives to subsidizing further development of underutilized spectrum. The Commission should not impose any additional performance requirements on commercial mobile radio services ("CMRS") carriers serving rural markets.

INTRODUCTION

As the Commission is aware, Dobson has a particular affinity for, and interest in, issues involving rural telecommunications, having begun as a single family-owned rural telephone company in the 1930s with a single exchange in Western Oklahoma. Because the Dobson family saw the potential of mobile telephony to improve the lives of its rural constituency, Dobson began offering cellular mobile services in 1990 in Western Oklahoma and the Texas Panhandle. Through an acquisition strategy targeting rural and suburban areas where wireless telecommunications services were not fully developed, Dobson has rapidly expanded its wireless operations and currently owns or manages wireless networks in sixteen states, from Alaska to New York, with its approximately 1.6 million customers covering a total population over 11.8

[2] Dobson operates its wireless telecommunications systems through its wholly-owned subsidiaries Dobson Cellular Systems, Inc. and American Cellular Corporation and each of their subsidiary licensees.

million as of December 31, 2004.[3] Dobson's wireless networks include rural areas, low-density ex-urban and suburban areas, and a handful of smaller cities; but approximately 85 percent of its coverage falls within areas that the Commission considers to be "rural." Most noteworthy, Dobson provides mobile phone service coverage to more than 98 percent of the population in its licensed areas.

Even with its rural orientation, Dobson was one of the first carriers to install digital technology in 100 percent of its markets, having upgraded its entire network from analog-only to dual mode analog/TDMA in the early stages of the digital migration. Just as Dobson was an industry leader in upgrading to TDMA, Dobson is one of the earliest adapters to GSM technology for rural markets, as it continues to introduce a variety of innovative products and services into its licensed territories. While Dobson is very different today than when it started out as a local exchange carrier in Dust Bowl-era Oklahoma, it remains highly committed to providing high-quality services to customers in rural areas and believes strongly in the future of rural wireless services.

Before taking any further action with regard to rural wireless licensing, the Commission should not lose sight of the state of the industry that its existing policies have fostered. In each of its last two annual competition reports on the state of the wireless industry, the Commission has concluded that effective competition exists in the CMRS marketplace, including rural areas, with the total U.S. population with access to multiple mobile telephone providers continuing to increase each year.[4] Over the past few years, the explosion of new technologies has made the

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[3] Dobson operates in 54 Rural Service Areas ("RSAs"), 13 Metropolitan Statistical Areas ("MSAs"), and 21 Basic Trading Areas (some of which overlap with its RSAs and MSAs). Dobson operates in some of these markets pursuant to spectrum manager lease agreements with the spectrum licensees; Dobson's successful experiences with spectrum leasing are discussed in greater detail later in this pleading.

[4] *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, WT Docket No. 04-111, *Ninth Report*, 19 FCC Rcd 20597, 20600, 20610 (2004) ("*Ninth Report*"); *Annual Report and*

service offerings available to subscribers in rural areas virtually indistinguishable from those that are offered in urban areas. Key to this explosion has been a regulatory environment free of excessive government intervention, allowing marketplace forces to drive development. The successes of Dobson and many other regional wireless carriers in expanding advanced digital services into large areas of rural America are shining examples of how an effective market-based approach can work.

Indeed, the Commission has introduced still greater flexibility over the last several months. In the adoption and reconsideration of the secondary markets initiative,[5] the Commission has encouraged the use of spectrum leasing as a tool for carriers to create coverage and services on otherwise underutilized spectrum. In the *Rural R&O*, the Commission has introduced significant licensee flexibility for meeting substantial service requirements, for utilizing infrastructure sharing arrangements and for increasing power levels in all CMRS services. Each of these policies is likely to provide new market-based initiatives for licensees to improve and expand their existing facilities and services into rural areas, much as they are being expanded and improved in urban markets. Before tinkering with the success achieved by existing policies, and even before allowing its new initiatives to take hold, the Commission would be well served by first assuring itself that, in light of its strong statements that effective competition continues to exist in the rural marketplace, there is even a problem that requires resolution.

Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, WT Docket No. 02-379, *Eighth Report*, 18 FCC Rcd 14783, 14793-94, 14877 (2003) ("*Eighth Report*").

[5] *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, WT Docket No. 00-230, *Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 20604 (2003); ("*Secondary Markets Order and Secondary Markets FNPRM*"); *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, WT Docket No. 00-230, *Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking*, 19 FCC Rcd 17503 (2004)("*Secondary Markets Second R&O and Second FNPRM*").

Nevertheless, in the *Rural FNPRM*, the Commission is considering proposals for spectrum take backs, for imposing more rigorous post-renewal substantial service requirements, and for creating easements or underlays on existing and future licensed spectrum. Rather than encourage further development of services in rural areas, Dobson believes that these proposals will create uncertainty for mobile providers and the capital markets upon which they rely, causing precisely the opposite effect on development as desired by the Commission. Because mobile telephony "has historically been an industry characterized by large investments in network infrastructure and vast economies of scale,"[6] access to capital is critical for new market entrants and for existing providers to expand coverage, implement technological advancements, and improve service quality.[7] Proposals that call into question the spectrum rights of licensees, whether those rights have been acquired through auctions or market transactions, will inherently weaken investor confidence, and thus negatively impact a licensee's ability to obtain capital for on-going and future business plans.[8]

I. The Current Market-Oriented Policies Are Beneficial To The CMRS Industry And Are Successful in Promoting The Commission's Policy Goals.

The Commission has a statutory obligation to facilitate widespread deployment of communications services to all Americans, including those doing business in, residing in, or visiting rural areas.[9] The Commission's current policies encouraging market-based competition

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[6] *Ninth Report*, 19 FCC Rcd at 20641.

[7] *Rural R&O* at ¶ 42. This is particularly true for rural CMRS providers that have higher marginal costs due to a smaller consumer base for cost allocation. *Id.*

[8] In addition to creating uncertainty in the capital markets, spectrum take backs, in particular, raise serious legal issues with respect to regulatory takings. *See Penn Central Transportation v. New York City*, 438 U.S. 104, 124 (1978). (A regulatory taking could occur based on "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.").

[9] *Rural R&O* at ¶ 4.

have significantly furthered these objectives.[10] According to the *Ninth Report*, the industry continues to expand coverage, with 97 percent of the total U.S. population (a two percent increase from the previous year) living in a county in which three or more different operators offer mobile telephone service.[11] Even greater increases were achieved in the number of counties in which subscribers have access to 4 or more, 5 or more, 6 or more, and 7 or more different mobile operators in the past year.[12] The Commission has noted that "additional providers are still entering the mobile telephone market at the county level, including some start-ups as well as operators that have previously launched mobile telephone service in other parts of the country, and that, in doing so, these additional providers presumably are enhancing competition."[13]

This increased level of competition is not limited to urban areas as the *Ninth Report* indicates that "CMRS providers are competing effectively in rural areas" as well.[14] In reaching this conclusion, the Commission cites to a Rural Cellular Association ("RCA") survey conducted in 2002 (the most recent survey available), which showed that there was an average of 5.1 wireless competitors in markets surveyed, leading RCA to conclude that there is "robust and effective competition, increasing year-to-year, in the markets served by RCA members."[15] In fact, even the Commission has recognized that "the average number of mobile operators estimated to be serving rural areas in the United States is greater than the average number of

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[10] *Ninth Report*, 19 FCC Rcd at 20601-02.

[11] *See id.* at 20600.

[12] *See id.*

[13] *See id.* at 20610-11.

[14] *Id.* at 20643.

[15] *See id.* (*citing* Keisling RCA Survey). Notwithstanding this evidence that the market-based system is in good working order, RCA illogically supported a "keep what you use" approach in the *Rural NPRM*. *See* Comments of Rural Cellular Association, WT Docket No. 02-381 at 5-6 (filed Dec. 29, 2003).

mobile operators serving countries with a reputation of having highly advanced mobile service markets such as Japan, South Korea, and Finland."[16] In short, there is generally no lack of competitive alternatives from which to choose in rural areas, and thus no need to alter the Commission's policies to address a problem that doesn't exist.

Dobson's record of service to rural America is a shining example of the success achieved by the Commission's market-based licensing policies. Dobson is constantly improving, upgrading and advancing wireless technologies to its largely rural constituency. For example, since filing comments in the *Rural NPRM* proceeding, Dobson has:

- Invested significant capital expenditures to complete its GSM/GPRS/Enhanced Data Rates for GSM Evolution ("EDGE") overlay throughout its networks nationwide, which includes a wireless footprint that covers 91 percent of Alaska's population.[17]

- Completed the acquisition of a GSM network and licenses covering rural areas in northern Michigan. Dobson plans to expand its coverage in these rural markets while upgrading the quality of this network through the addition of GPRS data service functionality.[18]

- Entered into an agreement with BlackBerry® to provide wireless internet access, SMS and other high-speed data capabilities to its customers. BlackBerry will operate utilizing Dobson's advanced GSM/GPRS network, in another example of Dobson's proactive approach in providing a myriad of advanced solutions.[19]

- Purchased broadband software-defined base stations from Alcatel, which are part of a solution in Michigan that will use GSM frequencies. The solution is designed to provide a more reliable and more economical mobile broadband access solution in rural and highway areas.[20]

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[16] *Ninth Report*, 19 FCC Rcd at 20643.

[17] *See News Release*, "Dobson Communications Reports Second Quarter 2004 Results" (rel. Aug. 9, 2004) (found at www.dobson.net).

[18] *See News Release*, "Dobson Communications Completes Acquisition of Properties in Northern Michigan" (rel. June 16, 2004) (found at www.dobson.net).

[19] *See Press Release*, "Dobson Communications to Offer Blackberry® In the United States" (rel. Nov. 9, 2004) (available at http://biz.yahoo.com/bw/041109/95216_1.html).

[20] *See* RCR Breaking News, "Dobson Orders Broadband Base Stations From Alcatel" (rel. June 30, 2004).

These achievements have required significant investment and would not be possible without the continued access to capital markets that the Commission's existing market-based competitive policies have fostered. There is simply no need to change these policies to achieve the types of technological advances to rural America that Dobson and other similarly situated regional rural carriers have been able to achieve under the existing regulatory regimen.

The Commission's existing market-based regulatory scheme already has created more than enough alternatives for getting otherwise underutilized spectrum into the hands of those carriers who will put it to the greatest and most valuable use. For example, the partitioning and disaggregation process has been and will remain an effective alternative for carriers, rural carriers in particular, to sell spectrum or geographic areas that they would not otherwise use to other carriers willing to pay a market-based price to provide service to the public. In the *Rural FNRPM,* the Commission anecdotally notes situations where rural entrants "have been repeatedly rebuffed in their attempts to entice license holders for various services" to partition or disaggregate spectrum,[21] as the basis for suggesting that perhaps these policies have failed in rural America. But there is no reason to believe that this is the result of a failed regulatory process rather than a refusal of a putative buyer to negotiate fair and reasonable terms, which would make the disaggregation or partition a more attractive economic alternative to the licensee than holding spectrum for which the licensee has no current use. Simply stated, licensees should have the ability to weigh such offers in the context of their own needs for current and future spectrum. The suggestion that the complaints of a few rebuffed rural carriers indicate a failed regulatory policy is belied by the hundreds of partitioning applications already on file, many covering large and small rural territories.

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[21] *See Rural FNPRM* at ¶ 147 (*quoting* Comments of OPASTCO/RTG, WT Docket No. 02-381 at 10-11 (filed Dec. 29, 2003)).

In fact, Dobson holds approximately fifteen PCS licenses that have been either partitioned and/or disaggregated over time. Dobson has been on both sides of these transactions, having partitioned licenses to other carriers and received licenses that have been divided. Due in large measure to the Commission's partitioning policies, Dobson's partitioned and disaggregated licenses have allowed it to focus its resources on smaller geographic areas that it deems to be economically viable based on its business plan.

Similarly, and as recommended by the Commission's Spectrum Policy Task Force ("SPTF"), the Commission adopted the new "secondary markets" regulations as still another means of increasing access to spectrum. As the SPTF noted, the Commission should address alternative mechanisms only "after there has been sufficient time to consider the effectiveness of this approach."[22] In fact, sufficient time has not elapsed to judge the effectiveness of the new secondary markets rule as the spectrum leasing rules first became effective on January 24, 2004, were clarified in an order released only last September, and the modified rules are still not in effect.[23]

Although still in its infancy, the new spectrum leasing regime has already provided carriers like Dobson with access to underutilized spectrum in rural areas. For example, Dobson has entered into a spectrum manager lease agreement with a licensee that provides Dobson with access to 10 MHz of B-Block broadband PCS spectrum throughout the entire state of Alaska, and Dobson has also utilized spectrum leasing as a means of gaining short term access to

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[22] *Facilitating the Provision of Spectrum Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, WT Docket No. 02-381, *Notice of Proposed Rulemaking*, 18 FCC Rcd 20802, 20817 (2003) (*citing Spectrum Policy Task Force Report* at ¶ 58) ("*Rural NPRM*").

[23] *See* Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, 68 Fed. Reg. 66232 (rel. Nov. 25, 2003). *See generally Secondary Markets Order and Secondary Markets FNPRM; Secondary Markets Second R&O and Second FNPRM*. In addition, in the *Secondary Markets FNPRM*, the Commission solicited comment on additional proposals in that proceeding.

spectrum in areas where it is better positioned than the licensee to provide advanced services.[24] By entering into these short term leases, Dobson has been able to upgrade the licensee's wireless operations to provide quality service to rural areas. Before considering more burdensome alternatives on licensees, the Commission should continue to rely on the market to best achieve full spectrum utilization and spur market advancements.

Those rural carriers who have complained about the lack of access to smaller partitioned areas (in the context of partitioning and, speculatively, spectrum leasing) suggest that the only "calculation" for existing licensees is the transactional cost of negotiating and executing a partition or spectrum lease with a rural carrier versus the acceptable return to the licensee. However, in a competitive market, the level of desired coverage also requires national, regional and local carriers to factor into their analysis the opportunity to expand coverage in their markets through roaming arrangements. In the end, each licensee does, and should be able to continue to, analyze the total economic consequences of each such transaction, in terms of license value, market share and total coverage, in determining how best to maximize its use of its spectrum.[25]

II. Regulatory Schemes That Create Negative Incentives On Efficient Economic Use Of Spectrum Should Be Rejected.

While Dobson is excited about the opportunities that spectrum leasing will provide for spectrum access and maximizing spectrum value, we strongly oppose the adoption of proposals

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[24] *See News Release*, "GCI Signs Agreement To Sell Dobson Communications Wireless Services In Alaska" (rel. July 27, 2004) (found at www.dobson.net).

[25] The Commission consistently discusses the possibility of taking "additional measures to ensure that unused spectrum moves into the hands of those who stand ready and willing to deploy wireless voice and data services to rural Americans." *Rural FNPRM* at ¶ 151. But the agency must be wary of creating market failures among otherwise healthy competitors by introducing otherwise uneconomic competition into the marketplace. As the Commission's own C Block experience shows, allowing undercapitalized entrants into an otherwise balanced competitive marketplace can have the unintended, and highly destructive, effect of weakening all participants, thereby forcing otherwise strong competitors either to reduce service or exit the marketplace entirely. There can, in some markets, be too much competition, to the long-term detriment of consumers.

that would force carriers to prematurely lease (or even partition and disaggregate) spectrum under threat of losing control of it and the long-term opportunity to use it for the licensee's own purposes. Such proposals will skew the secondary market initiative, potentially resulting in fire sales for spectrum at under-market prices, creating the type of uncertainty in the capital markets that necessarily impacts a carriers' ability over the long-term to bring enhanced services to the areas where the potential return is smallest, *i.e.*, to rural consumers.

Dobson is therefore strongly opposed to the Commission's "keep what you use" approach for existing PCS and future CMRS licenses. With 97 percent of the American population being served by three or more mobile wireless providers, there is simply no justification for imposing these types of additional performance requirements on the CMRS industry.[26] The Commission has correctly developed its policies to increasingly rely on marketplace forces to dictate the efficient allocation and use of spectrum. The Commission is ill-equipped to make the judgments necessary to determine, on a market-by-market basis, whether spectrum is underutilized, nor should it substitute its judgment for that of an efficient marketplace. Requiring licensees to allocate scarce capital and other resources based on avoiding a spectrum take-back, rather than on consumer needs in their license areas, would be a step backwards for the CMRS industry.

With the Commission allocating more than eight terrestrial CMRS licenses for any given geographic area, spectrum take-backs will lead to the unnecessary and likely uneconomic construction of network facilities in sparsely populated areas simply to "save the license." While there may already be five facilities-based providers in an area that can only support two, a licensee will be obligated to build there anyway, with no expectation of achieving a reasonable near-term return on the investment. If it fails to do so, it may lose the ability to offer services in

[26] This is an increase from 95 percent as reported in the *Eighth Report*. *See Ninth Report*, 19 FCC Rcd at 20600.

the areas when it makes economic sense in the future, or the license may have to buy back the spectrum, potentially from a party who was willing to speculate in the spectrum when it came up for auction as "unserved" area.[27] In contrast, the entire spectrum auction program is based on the assumption that licenses should go to those who value them most, and often the value includes the long-term as well as short-term use of the spectrum throughout the market area.

In the *Rural FNPRM*, the Commission has cited the successful deployment of cellular systems, which utilizes a spectrum relicensing mechanism, as the basis for proposing a similar "keep what you use" approach for existing PCS and SMR licenses.[28] Dobson is quite familiar with the cellular licensing regime, *i.e.*, the unserved area licensing process, having developed cellular systems extensively over the past 15 years, reaching virtually every corner of every RSA and MSA for which it was licensed.[29] But cellular systems were licensed with a different radio propagation, on a different licensing basis (after the initial 30 markets were licensed through comparative hearings, the balance of cellular licenses were awarded by lottery) with virtually no capital required through the application and licensing phase, and with different expectations as to the need to expand in order to maintain their service area. Cellular was also subject to the five year "use it or lose it" policy at a time when the Commission desired rapid development of

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[27] As noted below, the Commission's cellular unserved area program was rife with spectrum speculators who filed applications for small areas neighboring larger cellular areas, built minimal facilities needed to "save" their license and then either held the area hostage through above-market roaming rates or simply sold the area for a substantial premium back to the original licensee when the market actually warranted construction of facilities. It would be bad policy to create similar opportunities in the PCS spectrum where the licensee has already paid for the right to serve the territory in the future.

[28] *See Rural FNPRM* at ¶ 151 n. 455.

[29] It must be noted that the unserved area licensing process took years of protracted rulemaking proceedings and litigation before finally being implemented. *See Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules*, 5 FCC Rcd 1044 (1990); *Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules*, 6 FCC Rcd 6185 (1991); *Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules*, 7 FCC Rcd 2449 (1992) ("*Unserved Area Second Report and Order*").

wireless services in an environment in which only two carriers were operating. As a result, imposition of a "use it or lose it" unserved area licensing scheme was deemed necessary to spur development by these initial licensees, who otherwise lacked monetary incentives to expand beyond the most populated of areas and build into underserved areas.[30]

With the advent of auctions and the subsequent marketplace acquisition of cellular licenses, licensees have invested substantial sums of money to obtain their authorizations and have every incentive to put the spectrum to its greatest use. Marketplace forces, and not regulation, are thus driving Dobson and other rural carriers to extend coverage and introduce innovative services to rural areas wherever it is economically feasible to do so, as reflected in the *Ninth Report*.[31] Today, PCS providers (all of whom obtained their licenses in auctions in which they valued the spectrum based on the expectations of long-term opportunities to expand) compete with three, four or up to seven facilities based providers; and the economic equation facing PCS providers for expanding into areas is simply not the same as it was for cellular carriers one or two decades ago.[32]

Furthermore, the cellular "relicensing" approach has not been without problems, because it is dependent on the identification of areas that are being "used/served." To implement this program, the Commission created a complex mathematical formula to determine the reliable service area boundary contours that make up a licensee's cellular geographic service area ("CGSA").[33] However, the formula is based on antiquated analog technology even though most cellular systems have long since been upgraded to digital, and so the CGSA boundary does not

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[30] *See Unserved Area Second Report and Order*, 7 FCC Rcd at 2449-50, 2451-52 (subsequent history omitted).

[31] *Ninth Report*, 19 FCC Rcd at 20643.

[32] The Commission recognizes that the "complete forfeiture" model used for PCS licensing has had little more than half that time to develop. *Rural FNPRM* at ¶ 151 n.455.

[33] *See* 47 C.F.R. § 22.911.

truly reflect the actual service area boundaries of a cellular system.[34] Rather, carriers continue to work together to assure seamless coverage throughout their own service territories and typically even across CGSA borders. Even though the analog contours do not typically reflect the digital coverage from a cell site, the Commission continues to place administrative costs and burdens on licensees to file site-based applications for system modifications that affect the CGSA so that the Commission can keep track of what few areas of the country remain "unserved."

Having realized the many shortcomings of the cellular licensing scheme, the Commission's licensing policies for PCS licensees has evolved and now reflects a more market-oriented approach, thus providing licensees with substantially greater flexibility to define their technologies and their service areas with only limited restrictions on effective power at the geographic market boundaries.[35] To that end, the Commission has never even addressed, much less adopted, a specific technical standard for defining what is "served" by PCS systems operating in the 1.9 GHz band, relying instead on individual showings to satisfy any construction or substantial service obligations. Since the Commission has not mandated any specific technology for the PCS service (appropriately relying on the marketplace to determine what will best serve consumers needs), a number of different technologies have been developed and are continuing to be developed in the PCS spectrum that may have very different propagation characteristics from which to define "coverage" for purposes of determining what area or

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[34] Even more troubling is that the cellular "analog service" requirement will sunset in December 2007. *See Year 2000 Biennial Regulatory Review -- Amendment of Part 22 of the Commission's Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and other Commercial Mobile Radio Services*, 17 FCC Rcd 18401 (rel. Sept. 24, 2002). After the sunset, there will likely be very little "analog" coverage despite the fact that the "protected service contours" are based on this older technology.

[35] *Amendment of the Commission's Rules to Establish New Personal Communications Services*, Docket No. 90-314, *Second Report and Order*, 8 FCC Rcd 7700, 7754 (1993) ("We believe that 2 GHz PCS will be a highly competitive service and that licensees will have incentive to construct facilities to meet the demand for service in their licensed service areas. While we do not believe that specific loading requirements are necessary, we find that 2 GHz PCS licensees should be required to meet a minimum requirement for operation and service to ensure that spectrum is being effectively utilized.")

population is, indeed, served. In fact, within any particular licensed market, carriers today may be offering CDMA, TDMA, GSM, or other digital technologies, each of which has different "effective coverage" characteristics. Similar problems will exist in trying to mandate a "coverage" standard in other spectrum bands, where radio propagation characteristics added to technology differences could require a different standard in each case.

Simply stated, it would take years of protracted rulemaking to reach an industry consensus on what constitutes, even for existing technologies, an appropriate standard of "coverage" and would waste Commission and industry resources that could be much better spent in service and technology development. Further, the history of the wireless telecommunications industry demonstrates that any regulatory standard resulting from such effort would likely be outdated by the development of even newer technologies by the time it was to be implemented.

Most significantly, there is no need for such a standard to achieve the Commission's policies. To the contrary, given the substantial competitive forces at play in the industry, any "keep what you use" approach is likely to encourage carriers to devote resources inefficiently to unpopulated or sparsely populated areas solely to preserve future expansion opportunities, without any assurance that re-taking the spectrum will result in other carriers "stepping up" any sooner to provide service where the existing licensee cannot efficiently and economically do so. As noted below, if there are areas where the high cost of service simply cannot be absorbed by existing licensees, the Commission has in place programs such as the Universal Service Fund ("USF") and Eligible Telecommunications Carrier ("ETC") designation which, if appropriately implemented, will provide the necessary subsidies to the licensee to extend its facilities and services where they would not otherwise be efficiently established.

The Commission has allocated at least eight terrestrial CMRS licenses in any given area in the United States,[36] and more are soon to be auctioned. There is simply no basis for now finding a market failure because there are areas where every license is not being used to provide a mobile "facilities-based" service. To the contrary, if the economics of a given area will not support more than two or three facilities-based wireless service providers, re-licensing a new entrant will not change the marketplace, and only skews the market by forcing uneconomic and inefficient use of resources to add facilities where they cannot otherwise be justified. In fact, existing licensees already have every incentive to increase capacity so as to maximize the value of their unused spectrum.[37] Conversely, carriers seeking to serve consumers in sparsely populated regions are far better served by utilizing existing network infrastructure than repetitive development and construction of a competing network, which would needlessly happen in a "keep what you use" approach.

As noted above, if a new entrant's business case does justify developing underutilized spectrum in a given area, the existing secondary markets initiatives provide interested parties sufficient opportunities to enter the market. But with a "keep what you use" approach, the Commission runs the risk of not only undercutting spectrum leasing but also allowing spectrum speculation and warehousing to occur as parties file to claim relatively small areas of spectrum currently unused by the original licensee. These speculators generally have no intention to develop the claimed area, but instead have the sole purpose of reselling it back to the original licensee when the area becomes viable within the original licensee's business plan. This form of

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[36] *See Ninth Report*, 19 FCC Rcd at 20634-35.

[37] It simply defies logic when smaller rural carriers insist that they will build new system facilities and be able to operate successfully on a stand-alone basis where the larger regional carriers have decided that the extension of facilities cannot be warranted notwithstanding the scope and scale of their system operations. The Commission has consistently recognized that wireless services are best offered on a widescale, regional basis in order to obtain necessary economies of scale, and the "keep what you use" approach would create contrary incentives.

speculation is clearly beyond the Commission's intended purview as it crafts new policies but could clearly result from the realities of such a system.

If the Commission nevertheless concludes that market forces can be enhanced by new regulatory initiatives, there are many alternatives short of the draconian "keep what you use" approach suggested in the *Rural FNPRM*. Several ideas were discussed by commenters on the *Rural NPRM* which were not addressed in the Commission's analysis in the *Rural FNPRM*. For example, AT&T Wireless supported the award of bidding credits toward future auctions for carriers who may choose to return unused spectrum rather than lease or partition it.[38] Others supported the award of bidding credits, discounts on regulatory fees or other financial incentives to licensees who partition or lease spectrum,[39] essentially providing government subsidies to the partitionee/lessee by making it more financially attractive to the licensee to part with spectrum through a lease or partition than the partitionee/lessee might otherwise be willing to offer. These ideas are not intended to be comprehensive, but provide examples of the potential government supported inducements to existing market forces that may enhance the Commission's objectives without creating the uncertainties in the capital markets that are inherent in the more drastic "use it or lose it" approach.

Most importantly, however, Dobson strongly believes that the most effective means of facilitating the development of wireless telecommunications services and facilities into otherwise uneconomic areas is to ensure that CMRS providers have effective access to the Commission's existing universal service funding. This program provides high-cost areas of the country with

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[38] *See* AT&T Wireless Comments at 9-12.

[39] *See* Rural Coalition Comments at 11-14; UTStarcom Comments at 8-11. The American Mobile Telecommunications Association ("AMTA") and Nextel also supported the use of financial incentives to spur rural deployment. *See* Comments of AMTA, WT Docket No. 02-381, at 4-5 (filed Jan. 26, 2004); Comments of Nextel Communications, Inc., WT Docket No. 02-381, at 3-5 (filed Jan. 26, 2004).

equivalent telecommunications services as USF subsidies are designed to overcome a market dynamic that provides no incentives for carriers to serve areas that are cost prohibitive. As the nationwide wireless carriers have built their own facilities along the highway corridors in rural areas, roaming revenues for rural wireless carriers such as Dobson have steadily decreased. Coupled with higher deployment costs resulting from wireless technology improvements, there is an increased need for USF subsidies.

Additionally, Dobson pointed out in its petition for ETC designation in New York, that it does not simply focus its deployment in rural areas to the highway corridors. As such, Dobson faces high costs because it is committed to extending its networks into the sparsely populated rural towns and communities that lie well beyond major highway corridors. Universal service funding is necessary for wireless carriers to continue to provide high-quality wireless coverage in these very rural areas. If the Commission is truly concerned about the impacts of cost on the development of rural wireless telecommunications, then its existing USF and ETC programs, and not new regulatory regimes, should be strengthened to assure access to these funds by CMRS carriers.

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CONCLUSION

For the reasons set forth above, Dobson respectfully urges the Commission to reject any new regulatory program that inhibits market forces from dictating the growth and development of wireless telecommunications services. There simply has not been any market failure to justify such approach. Rather, Dobson supports allowing the market to continue to dictate the development of wireless services in rural areas.

Respectfully submitted,

DOBSON COMMUNICATIONS CORPORATION

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CERTIFICATE OF SERVICE

I, Lee J. Rosen, hereby certify that on the 14th day of January 2005, copies of the foregoing "Comments of Dobson Communications Corporation" have been served by first class mail, postage prepaid to the following:

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Federal Communications Commission
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/s/ Lee J. Rosen
Lee J. Rosen